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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1351

INDIANA & MICHIGAN ELECTRIC COMPANY,
A CORPORATION
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

I

OPINION BELOW

The Opinions of the Court of Appeals and the District Court are unreported. Copies of the opinions are attached hereto as Appendices A and B.

II

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1978. A petition for rehearing was filed on November 13, 1978 and was denied on January 12, 1979. A stay of mandate to petition this Court was granted on February 1, 1979. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III

QUESTION PRESENTED

Whether the Federal District Court has jurisdiction under Title III, Section 301 of the Labor Management Relations Act, 1947, as amended, to entertain a suit to enforce an alleged labor agreement on behalf of supervisors.

IV

STATUTORY PROVISIONS INVOLVED

1. Title III Section 301, Labor Management Relations Act, 1947, as amended, [29 U.S.C. § 185], reads:

> Sec. 301(a) suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in contention or without regard to the citizenship of the parties.

2. Title V, Definitions, Section 501(3) of the Labor Management Relations Act, 1947, as amended, [29 U.S.C. § 142], reads:

> Sec. 501. When used in this Act—

> (3) the terms "commerce" "labor disputes" employer, employee, "labor organization", "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

3. Title I, Section 2(3), The National Labor Relations Act, as amended in 29 U.S.C. § 152(3) reads, in pertinent part:

> Sec. 2(3) the term "employee". . . . shall not include any individual employed as a supervisor . . .

4. Title I, Section 14(a) The National Labor Relations Act, as amended, [29 U.S.C. § 164(a)], reads in pertinent part:

> 14. (a) . . . no employee subject to this Act shall be compelled to deem individuals employed as supervisors as employees for the purpose of any law, either National or Local, relating to collective bargaining.

V

STATEMENT OF THE CASE

This action was brought by the Union under Section 301 of the Labor Management Relations to enforce ar alleged agreement with the Company covering Master-Pilots and Pilots on barge lines operating on the Ohio river. The District Court held that the alleged agreement was one covering supervisors (there were also some non-supervisors in the unit but the agreement as to them is not in issue).

Nonetheless, the District Court ruled that, although "there is little question that Master-Pilots and Masters are supervisory employees," the alleged agreement was enforceable by mandatory injunction under Section

301. The District Court's decision was bottomed on the Court's belief that "the statutory policy toward supervisors" as identified in the amendments to the National Labor Relations Act under Title I did not apply to Title III, Section 301.

The District Court issued a mandatory injunction enforcing the alleged agreement on May 17, 1977.[1] The effect of complying with that order would have been to force more than 50 supervisors to work under the terms of the alleged labor agreement for three years. Evidence was produced to show that this would have required these supervisors to accept wages and benefits far lower than the salaries and benefits they were receiving as supervisors and as a part of management.

The Company then sought and obtained a stay while appealing to the Fourth Circuit.

The appeal was taken and denied in an unpublished opinion issued on November 1, 1978. Motion for rehearing was denied. A stay to file this petition was granted on February 1, 1979.

The Court of Appeals affirmed the finding of the District Court that a contract covering supervisors was consummated. This finding was based on the Appellate Court's opinion that the finding was not "clearly erroneous." The Appeals Court affirmed the District Court decision and order.

---

[1] The Company also presented evidence that no agreement concerning supervisors was ever consummated. While recognizing that there was evidence to support that contention, the District Court found that the preponderance of the evidence convinced it that such an agreement was reached.

With respect to the primary issue of Section 301 jurisdiction, the Appellate Court upheld the finding of jurisdiction without, however, advancing any rationale for its opinion. The Court cited three Appellate Court decisions but did not cite or attempt to distinguish the decision of the Court in *Beasley* v. *Food Fair,* 416 U.S. 932 (1965). This latter decision, we submit, reinforced by the language of the applicable statutory provisions is controlling in this case.

VI

ARGUMENT

The question we are presenting here is jurisdictional. We present no factual issue. The lower courts in this case have held that a suit to enforce an agreement covering supervisors as defined under the National Labor Relations Act is enforceable under Section 301 of the Labor Management Relations Act. We believe that this decision is wrong.

We respectfully submit that *Certiorari* should be granted for the reason that the Court of Appeals has decided an important question of federal law in a manner which conflicts with the opinion of at least one other Court of Appeals. Most importantly, the decision of the Court of Appeals has decided a federal question in conflict with a decision of this Court.

A. The Issue Is Important.

The issue here presented is an important one. That issue is whether a district court has jurisdiction to enforce an agreement covering supervisory personnel. That is an issue which we believe has already been decided in principle by the *Beasley* decision but obviously

the *Beasley* principle was not followed in the court below.

B. There Is Conflict in the Circuits.

We do have an apparent conflict of opinion among the circuits on this issue as we shall show. It is also significant that, even the few circuit courts who have been faced with this issue have shown a remarkable lack of conviction, decisiveness or logical analysis in reaching their decisions. The Fourth Circuit, as stated above, relied on three decisions from the Second, Sixth and Ninth Circuits. These decisions are characterized by convoluted majority reasoning and by strong dissenting opinions. We believe that the dissenting views carry the day in logic, statutory construction, and legislative intent.

The decisions cited by the Court below are:

1. *District 2, Marine Engineers Beneficial Association* v. *AMOCO Oil Company,* 554 F.2d 774 (6th Cir. 1977). In this case, the Union sought to enforce under Section 301(a) an agreement to hold an election for supervisors. District Judge Walinsky, Northern District of Ohio, dismissed the action for lack of jurisdiction. A majority of a three judge panel of the Sixth Circuit reversed on a questionable reading of legislative history. The majority held that the exemption of supervisors from compulsory bargaining or unionization was a narrow one, and, therefore, the literal, commonsense language of the statute exempting the agreement from enforcement under Section 301(a) was overridden by the presumed legislative intent.

We contend that the better reading of the statute and its underlying intent is found in the decision of

Judge Walinsky and the dissenting opinion of Judge Siler in *AMOCO Oil.*

Judge Siler, in his dissent, sums up quite accurately the confusion in the Courts and, in our view, the proper interpretation of the statute.

Judge Siler, dissenting:

> The district court was correct in its decision that it had no jurisdiction over this matter.
>
> The statutes are clear in their meaning. The district court has jurisdiction in "[s]uits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . ." 29 U.S.C. § 185(a). The definition of "employee" in the chapter is found in 29 U.S.C. § 142(3), where it states that "employee" has "the same meaning as when used in subchapter II of this chapter as amended by this chapter."
>
> Next, one goes to subchapter II of that chapter to find "employee" in 29 U.S.C. § 152(3) to exclude specifically "any individual employed as a supervisor". Finally, "supervisor" is defined in 29 U.S.C. § 152(11), which is not quoted here because the parties have stipulated that the designated officers in this case were, in fact, supervisors under this definition.
>
> Admittedly, Congress has indicated its intent to some degree, but where the statute is so clear, the intent must be subservient to the language in the Act itself. Otherwise, we may be giving "point to the quip that only when legislative history is doubtful do you go to the statute". *United States* v. *Bass,* 404 U.S. 336, 339, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), quoting Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev.

527, 543 (1947). As in *Bass,* we have a case where Congress asserted its intent, but it was not reflected in the ultimate legislation. Thus, the statute there, being criminal in nature, was narrowly construed in favor of the defendant. We do not have such a requirement at law to construe narrowly this labor statute, but when Congress establishes jurisdictional statutes, they should be confined to the precise limits as defined. See *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971).

Here, the majority opinion quotes from the Congressional reports on the Taft-Hartley Act (LMRA) of 1947, but those reports only relate that the Act takes supervisory employees from the jurisdiction of the National Labor Relations Board. But that still is not an all-inclusive explanation, for this same definition of employees transcends the National Labor Relations Act by virtue of 29 U.S.C. § 142(3), which incorporates the definition throughout chapter 7 of Title 29.

Assuredly, this is a case of first impression in this Court. My literal interpretation of the Act is criticized in *Dente* v. *International Organization of Masters, Mates and Pilots, Local 90,* 492 F.2d 10 (9th Cir. 1973), cert. denied, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) but Judge Browning apparently had problems with the majority's interpretation that the district court had jurisdiction. *Id.* at 12 (concurring opinion). The Second Circuit's decisions are rather diverse but one stated the district courts have no jurisdiction under 29 U.S.C. § 185 in this type of case. See *A. H. Bull Steamship Co.* v. *National Marine Engineers' Beneficial Assn.* 250 F.2d 332 (2nd Cir. 1957), cert. denied, 355 U.S. 932, 78 S.Ct. 411, 2 L.Ed.2d 414 (1958). However, that decision was

eroded through subsequent dictum in *United States* v. *National Marine Engineers' Beneficial Assn.,* 294 F.2d 385 (2nd Cir. 1961); *United States* v. *National Marine Engineers' Beneficial Assn.,* 292 F.2d 190 (2nd Cir. 1961); and *National Marine Engineers' Beneficial Assn.* v. *NLRB,* 274 F.2d 167 (2nd Cir. 1960). See also *Isbrandtsen Co., Inc.* v. *District 2, Marine Engineers' Beneficial Assn.,* 256 F.Supp. 68 (E.D.N.Y. 1966).

On the other hand, there is dictum from *International Organization* of *Masters, Mates & Pilots* v. *NLRB,* 122 U.S. App. D.C. 74, 78, 351 F.2d 771, 775 (1965), that

> [A] collective bargaining agreement entered into by MMP on behalf of Local 47 would not be within section 301 of the Taft-Hartley Act . . . 29 U.S.C. § 185 (1958), since that section deals only with "contracts between an employer and a labor organization *representing employees* * * *" [emphasis added]. Such a construction of this language would seem to be eminently correct in the context of section 301.
>
> I would follow this language and the explicit language of the statute to uphold the decision of the district court in dismissing the suit.

2. *Dente* v. *International Organization of Masters, Mates, and Pilots, Local 90,* 492 F.2d 10 (9th Cir. 1973).

Dente is hardly a persuasive precedent. It may be noted that it involved a suit by a Union member against his Union—not a union—employer suit. A look at the decision shows that it dealt in a most superficial way with the issue here in hand. The suit was actually

dismissed. More significant is the precautionary comment of concurring Judge Browning who states:

> It is unnecessary to decide whether Section 301 extends to suits for violation of a contract between an employer and an organization representing supervisory personnel, *a problem more difficult* for me than the opinion of the Court would suggest. [emphasis supplied].

3. *National Marine Engineers' Beneficial Association* v. *Globe Seaways, Inc.*, 451 F.2d 1159 (2d Cir. 1971). This was an action to enforce an arbitration award. The only reference to Section 301 suits to enforce agreements covering supervisors is found in a footnote. This note, together with the other Second Circuit decision discussed in Judge Siler's dissent, shows both the vacillation of the Second Circuit and the need for clarification of the law on this issue.

It must be pointed out that the courts below in the instant case made no analysis of the statute in their decisions. No mention was ever made of the decision of this Court in *Beasley* or the view of the District of Columbia Circuit in *International Organization of Masters, Mates, and Pilots of America, Inc.*, v. *NLRB*, 351 F.2d 771 (D.C. Cir. 1965).

Passing over *Beasley* for the moment, we again call attention to the view of the District of Columbia Circuit, referred to by Judge Siler:

> It may well be . . . that a collective bargaining agreement entered into by MPP on behalf of Local 47 would not be within Section 301 of the Taft-Hartley Act, [citation omitted], since that section deals only with "contracts between an employer and a labor organization *representing employees*"

> [emphasis in original]. Such a construction of this language would seem to be eminently correct in the context of Section 301. Id. at 775.

Except for these three circuits, no other circuit to our knowledge has spoken on the subject. The words spoken by these three circuits demonstrate disagreement and lack of clarity of analysis. An important principle of labor law should not have to stand on such precarious ground.

C. The Decision Conflicts With the Statute.

The interpretation of Section 301 by the court below runs head on into the statute, its structure, and clearly expressed intent.

The Court below holds that the exception of supervisors from the provisions of the Act applies to Title I (The National Labor Relations Act), but not to Title III, Section 301, which waives jurisdictional requirements for suits in the federal courts. Judge Siler in his dissent in *AMOCO Oil* has surgically exposed the fallacy of that attempted dichotomy.

The Labor Management Relations Act, of 1947, from which the legislative treatment of supervisory personnel must be derived, shows a clear legislative purpose of excluding supervisory unions from any recognition under federal law. To argue that supervisors are excluded from the definition of "employee" under Title I of the National Labor Relations Act but included in the definition of "employee" under Title III, Section 301(a), defies all logic and common sense. It also does violence to the literal words of the statute, and those words, lacking any ambiguity and not softened or altered by any legislative reference, should be observed.

Analysis of the meaning of a statute must begin by examining the statute itself, and only if the language is ambiguous is resort to other means of statutory construction appropriate. Thus, it has been said:

> [T]he meaning of the statute must, in the first instance be sought in the language, in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms. *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917).

See also, *General Electric Co.,* v. *Gilbert,* 429 U.S. 125 (1974). *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Ex Parte Collet, Ill. and Ky.,* 337 U.S. 55 (1949); *Gemsco Co., Inc.* v. *Walling,* 324 U.S. 244 (1945); *Kuehner* v. *Irving Trust Co., N.Y.,* 299 U.S. 445 (1937).

In the present case, the language of the statute is clear and unambiguous and plaintly demonstrates that Section 301 does not confer jurisdiction when the sole issue involves the rights and obligations of supervisors and their employers under an alleged collective bargaining agreement.

Section 301(a) grants to Federal courts, without respect to the amount in controversy or the citizenship of the parties, jurisdiction over:

> [s]uits for violation of contracts between an employer and a labor organization representing *employees* in an industry affecting commerce . . . [emphasis supplied].

The key question raised by this section is whether a supervisor is an "employee" so that a suit by a labor organization representing supervisors is a suit between "an employer and a labor organization representing employees."

Section 2(3) of the National Labor Relations Act states:

> The term "employee" . . . shall not include . . . any individual employed as a supervisor.

Section 501 of the Labor Management Relations Act incorporates this definition and makes it applicable throughout the Labor Management Relations Act.

Section 501 reads:

When used in this Act—

* * *

> (3) The term[s] "employee", shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

The clear and unambiguous meaning of this section is that for purposes of the entire Labor Management Relations Act, including Section 301 of Title III of that "Act," supervisors are not "employees." Any other interpretation flatly contradicts the plain meaning of Section 501.

Independent of the definitional sections in 2(3) and 501(3), Section 14(a) of the National Labor Relations Act prohibits a court from compelling an employer to deem supervisors "employees" for purposes of any law relating to collective bargaining. This section provides in pertinent part:

> [N]o employer . . . shall be compelled to deem . . . supervisors as employees for the purpose of any law . . . relating to collective bargaining.

This section clearly applies to "any law"—not merely the National Labor Relations Act—and thus clearly applies to Section 301 of the Labor Management Relations Act. To order enforcement of the alleged agree-

ment under Section 301 would compel the Company to deem supervisors to be "employees" for purposes of § 301, and thus would violate the clear language of § 14(a).

D. The Legislative Policy as Expressed in the Legislative History of the Labor Management Relations Act Supports Rather Than Contradicts the Plain Statutory Language.

The original Wagner Act, enacted in 1935 (National Labor Relations Act), did not expressly include or exclude supervisors from the definition of "employee" in Section 2(3). Apart from excluding agricultural workers and domestics, Section 2(3) of the Act defined "employee" as "any employee". Controversy arose as to the status of supervisors. After a series of contradictory decisions, the National Labor Relations Board held that a supervisor was an "employee" for purposes of the Act and therefore had collective bargaining rights just as other employees did under the Act, but that supervisors could be represented only in their own bargaining units. *Packard Motor Car Company,* 64 NLRB 1212 (1945). This ruling came under sharp criticism and was a major factor in bringing about passage of the Labor Management Relations Act, 1947, commonly known as the Taft-Hartley Act.

Among other things, the Labor Management Relations Act: (1) amended Section 2(3) of the National Labor Relations Act (Title I) [2] to expressly exclude supervisors; (2) added section 14(a) to the National Labor Relations Act which protected employers from being compelled to deem supervisors "employees" for

[2] The National Labor Relations Act, as amended, became Title I of the Labor Management Relations Act.

the purpose of any law relating to collective bargaining; (3) enacted § 301 of Title III to provide for suits by and against labor organizations "representing employees"; and (4) in Section 501 [3] of Title V (Definitions) excluded supervisors from the definition of "employee" for all purposes under the Labor Management Relations Act, which, of course, includes Title III, Section 301(a).

The legislative history of the Labor Management Relations Act establishes beyond doubt that one of the primary purposes of the Act was to restore to management the undivided loyalty of its supervisors by reversing the National Labor Relations Board decisions extending collective bargaining rights to unions representing supervisors.

In recommending passage of the Labor Management Relations Act, the Senate Report stated that it:

> eliminates the genuine supervisor from the coverage of the [National Labor Relations Act] as an employee *and makes it clear that he should be deemed a part of management.* [emphasis supplied] S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947).

It went on to decry the trend towards increased collective bargaining by supervisors under the National Labor Relations Act:

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering super-

[3] This section is contained in Title V of the Labor Management Relations Act.

visory personnel traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise.

* * *

The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act, disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled.

* * *

It is natural to expect that unless this Congress takes action management will be deprived of the undivided loyalty of its foremen. Id., at 3, 4 and 5.

The Report went on to state that the bill would restore supervisors to the position they had held *before* they were deemed to be "employees" under the National Labor Relations Act. *Id.* at 5.

The House Report reflected this same belief that unionization of and collective bargaining with supervisors was undesirable:

> The evidence before the committee showed conclusively that so called independent unions of foremen are not in fact independent, but that the unions of men the foremen supervise actually control them. The evidence further shows that management must have in the plants agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers. H.R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947).

Again, at page 14, the Report noted that unionization and collective bargaining for supervisors was harmful:

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants. . . .

The Report went on to note that supervisors, "are management people . . . [and] have demonstrated their ability to take care of themselves without depending upon the pressure of collective action." *Id.*, at 16-17.

The close tie betwen § 301 of Title III and the National Labor Relations Act (Title I) was pointed out repeatedly in the Senate Report:

> In the judgment of the committee, breaches of collective agreements have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in Title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purposes of the Wagner Act which the Supreme Court declared was "to compel employers to bargain collectively with their employees to the end that an employment contract,

> binding on both parties, should be made" (H.J. Heinz & Col., 311 U.S. 514). S. Rep. No. 105, 80th Cong., 1st Sess 15 (1947).

The Report went on to note that § 301 was a logical and necessary step in advancing Congress' past policy of encouraging collective bargaining under the National Labor Relations Act:

> The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.
>
> Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. *Id.*, at 17.

Still later in the Report it is pointed out that Section 301 should be read in connection with Section 8 of Title I, which made unlawful various employer and union practices which tended to frustrate collective bargaining. *Id.* at 30.

Contrary to the ruling of the court below, the legislative history shows that, §§ 14(a) and 501(3) were intended to encompass the Labor Management Relations Act in its entirety and not be limited to Title I.

The Senate Report leaves no doubt that Section 14 was intended to remove any compulsion requiring an employer to treat supervisors as employees for any collective bargaining purposes. S. Rep. No. 105, 80th Cong., 1st Sess. 28 (1947). The explanation of § 14 in the House Conference Report reiterates that Section 14 applies to "any law, either national or local, relating to collective bargaining." H. R. Rep. 510, 80th Cong., 1st Sess. 60 (1947).

The section of the Senate Report explaining Section 501 simply states that this section defines certain terms "which are used *generally* throughout the Act." S. Rep. No. 105, 80th Cong., 1st Sess. 30 (1947). The House Conference Report, which adopted Section 501 of Title V in the Senate bill, states:

> Section 501 of the Senate amendment contained definitions of terms used in Titles II, III, and IV. It should be noted that none of the terms defined, however, have any application to the amendment to Section 313 of the Federal Corrupt Practices Act since section 313 of the Corrupt Practices Act is not part of "this Act". [footnote omitted]. H.R. Rep. 510, 80th Cong., 1st Sess. 68-69 (1947).

Certainly the all-inclusive language, qualified only by the express exception for that part of the Act amending the Federal Corrupt Practices Act, indicates that § 501 was intended to broadly define "employee" for the entire Labor Management Relations Act, including Section 301. The reason this statement does not refer to Title I is that Section 501 adopts for Title II, III, and IV, the definitions contained in Title I, specifically including the definition of "employee" as excluding supervisors.

In short, the legislative history is fully supportive of the express language of §§ 2(3), 501(3), 14(a), and 301, and gives added support to the plain meaning of these provisions. The structure, language, and legislative history are in harmony in demonstrating that the statutory policy toward excluding supervisors from all provisions of the Act applies as equally to Title III, and Section 301(a) thereof as to Title I.

E. The Decision of the Court Below Conflicts With the Decision of This Court in the Beasley Case.

The Court below does not even so much as mention the decision of this Court in *Beasley* v. *Food Fair,* 416 U.S. 653 (1954). The decision of the Court below conflicts with *Beasley*. The court below, has therefore, decided a federal question in a way which is in direct conflict with a decision of this Court.

Beasley involved an interpretation of the scope of Section 14(a) of the Act. We argued *Beasley* as a controlling precedent in the Court below, but the Court made no reference to it.

In *Beasley,* this court unanimously held that, far from being restricted to Title I, Section 14(a) applies to *any law* relating to collective bargaining [emphasis supplied] and prohibited any agency or court for treating supervisors as "employees" for any purpose pertaining to collective bargaining.

The Court said:

> We conclude, therefore, that the second clause of § 14(a) relieving the employer of obligations under *"any law,* either National or local, relating to collective bargaining" [emphasis supplied], applies to any law that requires an employer "to accord to the first line of management the anomalous status of employees", S. Rep. No. 105, *supra* at 5. Enforcement against respondents in the case . . . would plainly put pressure on respondents "to accord to the front line of supervisors the anomalous status of employees". 416 U.S. at 662.

Since § 301 is such a "law," *Beasley* excludes agreement covering supervisors from its reach.

CONCLUSION

For the above reasons, we respectfully request that a writ of certiorari issue.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1926

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
ON BEHALF OF LOCAL UNION No. 14259,
Appellee,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, A CORPORATION,
Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Chief Judge.

(Argued June 6, 1978 Decided November 1, 1978)

Before BRYAN, Senior Circuit Judge, WIDENER, Circuit Judge and CHAPMAN, District Judge.*

GUY FARMER (FARMER, SHIBLEY, McGUINN & FLOOD; ROGER SCHNAPP, Labor Counsel, American Electric Power Service Corporation on brief) for Appellant; STANLEY M. HOSTLER (ROBERT J. SMITH, HOSTLER AND SHINABERRY on brief) for Appellee.

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* Sitting by designation.

PER CURIAM:

The Indiana & Michigan Electric Co. appeals from the District Court order that it comply with an agreement dated December 14, 1976, allegedly made by the Company with Local Union 14259 and requiring recognition of the latter as the "exclusive bargaining representative of those employees classified as master-pilots, pilots, operators, engineer-deckhands, and engineers. . . ." The order issued out of a non-jury trial of a suit brought against the Company by United Steel Workers of America, AFL-CIO-CLC, on behalf of the Local, under § 301 of the Labor-Management Relations Act, 29 USC 185.

The Company operates a barge line on the Ohio River and tributaries, transporting coal for use at its electrical generating plants. Upon acquisition of the barge line on September 1, 1973, the Company succeeded to agreements whereby Local 14259 served as the bargaining representative of a group of supervisory (master-pilots and pilots) and non-supervisory (chief engineers and engineer-deckhands) personnel and Local 14811 served as representative of other non-supervisory employees, referred to collectively as deckhands. These agreements were to expire November 6, 1973 but the Company had agreed to extend them to November 17, 1976. On October 10, 1976 the employer and both locals voluntarily entered into negotiations towards new contracts. On November 10, 1976 it made individual offers to the two locals respecting wages and terms and conditions of employment. However, four days later these offers were rejected by vote of each local's membership. On November 18, 1976 they went out on strike. Improved offers were submitted to both locals on December 9, 1976. No. 14259 on December 14 voted to accept the proposal; No. 14811 in a separate membership meeting on that day voted to reject it.

The critical issue on this appeal of the Company is posed by its contention that the acceptance by 14259 of the Company's offer was conditioned upon 14811's also accepting it; but 14811 having failed to do so, there was never a contract between the parties.

Upon conflicting evidence the District Court found that 14259's acceptance was unconditional and thereon concluded that a contract was consummated when the membership of 14259 voted to accept the December 9 offer. As we cannot hold this finding to be "clearly erroneous", we accept it. FRCiv.P 52. Other assignments of error, including lack of jurisdiction of the case under § 301 of the Labor-Management Relations Act, have been considered but we adjudge them unsustainable in the context of this case. Dist. 2, Marine Eng. Ben. Ass'n v. Amoco Oil Co., 554 F2d 774 (6 Cir. 1977); Dente v. International Org. of Master, Mates & P., Loc. 90, 492 F2d 10 (9 Cir.), *cert. denied*, 417 US 910 (1974); National Marine Eng'rs Beneficial Ass'n v. Globe Seaways, Inc., 451 F2d 1159, 1160 n.1 (2 Cir. 1971).

Accordingly, the Company was rightly ordered to comply with the terms and conditions of the December 14, 1976 collective bargaining agreement. Observing no errors of law in his conclusions, we affirm on the opinion of the District Judge, United Steelworkers of America, AFL-CIO-CLC, on behalf of Local Union 14259 v. Indiana & Michigan Electric Company, Civil Action No. 76-0748-CH (SDW.Va. May 17, 1977).

Affirmed.

APPENDIX B

Received May 23, 1977

Filed May 17, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

Civil Action No. 76-0748-CH

. UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
ON BEHALF OF LOCAL UNION 14259,
Plaintiff,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, A CORPORATION,
Defendant.

MEMORANDUM OPINION

United Steelworkers of America [1] filed this action seeking injunctive relief to enforce an alleged collective bargaining agreement entered into by Steelworkers on behalf of Local Union 14259 [2] and Indiana & Michigan Electric Company.[3] Jurisdiction of this Court is based upon the provisions of Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185.

In view of the findings of fact and conclusions of law hereinafter set out, the Court is of the opinion that appropriate relief should be granted.

FINDINGS OF FACT

The Company operates a barge line on the Ohio River and its tributaries for the purpose of transporting coal for

[1] Hereinafter referred to as "Steelworkers."

[2] Hereinafter referred to as "local 14259."

[3] Hereinafter referred to as "Company."

use at its various electric generating plants. Local 14259 has served as representative of a group of supervisory and non-supervisory personnel totaling 91 employees, 53 of which are master-pilots and pilots (supervisory) and 38 of which are classified as chief engineers or engineer-deckhands (non-supervisory). Local Union 14811 [4] serves as the bargaining representative for other non-supervisory personnel, referred to collectively as deckhands. Neither local is certified by the National Labor Relations Board. Recognition of these locals and the entering into contracts with them is purely on a voluntary basis.

On September 1, 1973, the Company purchased the assets of O. F. Shearer & Sons, Inc. On that date, Shearer & Sons had an agreement with both local 14259 and local 14811 respecting wages and terms and conditions of employment. These agreements became effective on November 17, 1973, for a period of three years, expiring at midnight on November 17, 1976.

On October 20, 1976, the Company and both locals entered into voluntary negotiations to reach new agreements. On November 10, 1976, the Company submitted a written offer to local 14259, but that offer was rejected by a vote of its membership. On December 9, 1976, the Company made improved, written offers to both locals. On December 14, 1976, the members of local 14259 voted to accept its offer. On the same date, Captain Buck Snodgrass, a member of the local's negotiating committee, informed George Shamblin, manager of the Company's river transportation division, that the Company's December 9 written offer had been accepted as submitted. However, local 14811 rejected its improved offer on December 14. It is at this point that the overriding issue in this case comes into focus. On the one hand, the Company submits that the acceptance on the part of local 14259 was conditioned on local 14811 accept-

[4] Hereinafter referred to as "local 14811."

ing its offer from the Company, which, of course, did not occur. Thus, the Company argues, when the condition did not occur, there was no acceptance and no contract came into being. On the other hand, the unions submit that the acceptance was unconditional and the contract was formed when the membership of local 14259 voted to accept the offer on December 9. There is evidence in this case supporting both contentions. However, the Court believes that the preponderance of the evidence sides with the unions' position and the Court so finds.

At any rate, predicated on its belief that since the event upon which acceptance of local 14259 was conditioned did not occur and that therefore no contract was entered into, the Company on December 23, 1976, withdrew its recognition of the master-pilots and pilots because they were supervisors. A new offer was made to the remaining non-supervisory personnel of local 14259, which has not been accepted. Thereafter all personnel for both locals returned to work. Local 14811 is still without a contract.

It is true, as the Company points out, that after the December 14 vote, the members of local 14259 did not return to work. It is contended by the Company that such action amounts to conclusive evidence of their non-performance, which in turn was conclusive evidence that no contract was formed. The record in this action, however, refutes this argument.

Article IV of the agreement offered on December 9, 1976,[5] reads as follows:

"ARTICLE IV

No Strikes or Lockouts

During the life of the Agreement there shall be no lockouts on the part of the employer, nor suspension

[5] Article IV of the 1976 agreement was identical with the no-strike provision of the 1973 agreement.

of work on the part of the employees. This agreement is a guarantee that there will be neither strikes nor lockouts and that all disputes shall be settled as herein provided. Refusal to board or handle any equipment made idle as a result of a legitimate strike shall not be deemed a violation, except the Master-Pilot, Pilot, Engineer, Operators, and Engineers-Deckhands shall stand security watch if necessary and requested."

It is undisputed that local 14811 was on a legitimate strike. Thus, the only duty owed the Company by the members of local 14259 under the December 9, 1976, offer was that the members of that local would stand security watches, which they did. Local 14259 members therefor did perform under the provisions of the new contract.

DISCUSSION

Aside from contending that no contract was entered into by the Steelworkers on behalf of local 14259 and the Company, the Company also advances certain legal propositions which, if sustained, would require the Court to find in its favor.

First, the Company asserts that this Court lacks subject matter jurisdiction of this action in that Section 301 of the Act does not give a district court jurisdiction to entertain a suit to enforce a labor agreement on behalf of supervisory personnel.

Section 301 of the Act, 20 U.S.C. 185(a), confers jurisdiction upon district courts over "[s]uits for violation of contracts between an employer and a labor organization representing *employees* in an industry affecting commerce. . . ." [Emphasis supplied]. The Company's position is that since supervisory personnel are not employees[6]

[6] There is little question that master-pilots and pilots are supervisory personnel and not employees.

under the Act, this action may not be maintained under Section 301.

The Ninth Circuit Court of Appeals was faced with this problem to which it responded in *Dente* v. *Masters, Mates and Pilots,* 429 F.2d 10, 12 (9th Cir. 1974) *cert. denied* 417 U.S. 910 (1974):

> ". . . This rather mechanical approach to the statutory interpretation has found some judicial adherents. See *Masters, Mates & Pilots Union* v. *NLRB,* 351 F.2d 771, 59 LRRM 2566 (D.C. Cir. 1965); *Pharmacists, Local 330* v. *Lake Hills Drug Co.,* 255 F.Supp. 873, 55 LRRM 2844 (W.D.Wash. 1964) (dictum). We, however, agree with the Second Circuit that Congress, by eliminating supervisory employees from the bargaining and organizational protection of subchapter II, did not intend to deprive members of 'supervisory unions' of the rights secured by section 301. E.g., *National Marine Eng'rs Beneficial Ass'n* v. *Globe Seaways, Inc.,* 451 F.2d 1159, 1160 n.1, 79 LRRM 2067 (2d Cir. 1971); *United States* v. *National Marine Eng'rs Beneficial Ass'n,* 294 F.2d 385, 48 LRRM 2937 (2d Cir. 1961); *Isbrandtsen Co.* v. *District 2, Marine Eng'rs Beneficial Ass'n* 256 F.Supp. 68, 62 LRRM 2488 (E.D.N.Y. 1966); see *United States* v. *National Marine Eng'rs Beneficial Ass'n,* 292 F.2d 190, 192, 48 LRRM 2605 (2d Cir. 1961). We thus conclude that the complaint stated a claim within the District Court's jurisdiction."[7]

In addition, and as the Steelworkers point out in its brief, "the legislative history of the Act evidences that the statutory policy toward supervisors as codified in §§ 2(3), 2(5), 2(11) and 14, applied to Title I of the [Act] and not

[7] See also, *National Eng'rs Beneficial Ass'n* v. *Globe Seaways, Inc.,* 451 F.2d 1159 (2nd Cir. 1971).

to title III, § 301(a)." See, *United States* v. *NMEBA,* 294 F.2d 385 (2nd Cir. 1961).

Second, the Company takes the position that it exercised its right under the Act to withdraw recognition of the Union as the representative of the supervisory personnel. The Company correctly asserts that an employer, such as the Company, may voluntarily recognize a union for supervisors and voluntarily enter into a contract with that union; but the Company incorrectly maintains that it need not comply with such agreement unless it voluntarily undertakes to do so. From this fallacious premise the Company concludes that if it does not wish to honor such contract, *no* law—state or federal—can require it to do so.[8] This simply is not the case.

The Company would distinguish *Dente,* supra, on the basis that *Dente* involved an action against a union. Nevertheless, the *Dente* court provided a jurisdictional vehicle in the form of Section 301 to litigate the case against a union composed of supervisors. The rationale of the Company's argument that an action under Section 301 may be maintained against such a union but not on its behalf must fall.

Third, the Company urges that the West Virginia Statute of Frauds, W. Va. Code 55-1-1, bars this action. The pertinent part of the statute reads as follows:

> "No action shall be brought . . . (f) upon any agreement that is not to be performed within a year, unless the . . . contract [or] agreement . . ., or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent. . . ."

Assuming that the above-quoted portion of W. Va. Code 55-1-1 applies at all in this case,[9] it has been satisfied by

[8] Defendant's post-hearing Brief, p. 9.

[9] See, *Farmer* v. *United Brotherhood of Carpenters and Joiners,* —— U.S. ——, 45 L.W. 4263. This case would indicate that a state's Statute of Frauds would not apply in a Section 301 case.

the acceptance by local 14259 of a written offer made by the Company, which is in this instance the party to be charged.[10]

Finally, the Company takes the position that this Court is without jurisdiction to grant any relief sought by the plaintiff by reason of the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115. None of the acts which are not subject to restraining orders or injunctions are present in the case at bar.[11] Thus, as the Court stated in *Retail Clerks* v. *Lewis,* 327 F.2d 442, 456 (9th Cir. 1964):

> "We do not think that an order directing an employer to comply with a collective bargaining contract, in a setting which none of the things described in the Norris-LaGuardia Act has occurred, even though it might technically be called an injunction, is the kind of injunction contemplated by that Act." [12]

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties to this action by virtue of the provisions of Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185.

2. On December 14, 1976, by virtue of an affirmative vote by its members, local 14259 unconditionally accepted the Company's written offer of December 9, 1976, respecting wages and terms and conditions of employment.

3. By reason of the acceptance and approval of the members of local 14259 on December 14, 1976, a valid and enforceable collective bargaining agreement was formed on said date to expire on November 17, 1979.

4. The action of the Company in withdrawing recognition of master-pilots and pilots on December 23, 1976, is null and void.

5. To the extent they were required to perform under the provisions of the agreement, the members of local 14259 did so perform.

6. The conduct on the part of the Company, as described herein, constituted a breach of the agreement.

7. Plaintiff is entitled to an appropriate order directing the Company to comply with the provisions of said Collective Bargaining Agreement.

DATED: May 17, 1977

/s/ DENNIS R. KNAPP
Dennis R. Knapp
UNITED STATES DISTRICT JUDGE

A TRUE COPY, certified this
18th day of May, 1977

[Illegible] Clerk

By ALLEN M. DELONG, Deputy

[10] While a written offer is not necessarily the contract itself, it is, at the very least, a "memorandum or note thereof."

[11] See, 29 U.S.C. § 104.

[12] See also, *Textile Wkrs. Union* v. *Lincoln Mills,* 353 U.S. 448 (1957).